STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED June 17, 2014
v	No. 315029 Wayne Circuit Court
ALANTE LEONARD DAVIS, Defendant-Appellant.	LC No. 12-011830-FC

Before: DONOFRIO, P.J., and GLEICHER and M. J. KELLY, JJ.

PER CURIAM.

After a jury trial, the jury convicted defendant of unlawfully driving away a motor vehicle, MCL 750.413. The trial court sentenced defendant as a second habitual offender, MCL 769.10, to a term of two to 7-1/2 years in prison. Defendant appeals as of right. We affirm.

The victim testified that late on a December evening in 2012, she drove a white, 2000 Chevrolet Malibu to a party store in Detroit. The victim recounted that she parked on Mack Avenue and left her keys in the ignition while she tried to locate her debit card. A man wearing a black hoodie, holding his hand inside the hoodie's pocket and pointing his hand toward the victim, pulled open the driver's door of the car, ordered the victim out of her car and drove the vehicle away. The victim identified defendant at trial as her assailant. The prosecutor introduced a statement defendant gave to the police, in which he acknowledged that he had observed the car parked near the party store "with the keys in the ignition" and no one inside, "so [he] just got in and drove off in it." Defendant admitted during the interview that he intended to strip the car and sell the parts. Defendant testified to the same effect at trial. He also called for the defense Brian Williams, who testified that he had driven defendant to the party store, on entering and leaving the store defendant had noted the presence of the keys in the Malibu's ignition, and after leaving the store defendant had driven away the unoccupied car.

Defendant first contends that the prosecutor committed misconduct in cross-examining Williams concerning whether he had informed the police about his observations of the crime. Because defendant did not raise this issue in the trial court, it qualifies as unpreserved for appellate review. *People v Dupree*, 486 Mich 693, 703; 788 NW2d 399 (2010). We review this issue only to ascertain whether any plain error affected defendant's substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999). We review alleged instances of prosecutorial misconduct in context to determine whether the defendant received a fair and

impartial trial. *People v Watson*, 245 Mich App 572, 586; 629 NW2d 411 (2001). "A prosecutor's good-faith effort to admit evidence does not constitute misconduct." *People v Dobek*, 274 Mich App 58, 70; 732 NW2d 546 (2007).

Michigan courts have recognized that "a prosecutor may cross-examine a non-alibi defense witness regarding his failure to come forward prior to trial with the information testified to at trial *if* the information is of such a nature that the witness would have a natural tendency to come forward with it prior to trial." *People v Emery*, 150 Mich App 657, 666; 389 NW2d 472 (1986) (emphasis in original). A potential nonalibi witness may possess a natural tendency to disclose information when he or she shares a close relationship with the defendant, has personal knowledge of the subject of the witness's testimony, the subject of the witness's testimony has some tendency to exonerate the defendant, or any other relevant facts exist that tend to substantiate the likelihood that the witness would come forward. *Id*. at 666-667; *People v Perkins*, 141 Mich App 186, 196-197; 366 NW2d 94 (1985).[1]

The prosecutor elicited from Williams on cross-examination that he had been defendant's friend for around 10 years. At some point, Williams learned of defendant's arrest. When asked how he learned of defendant's trial date, Williams responded that "a month after the first . . . court date [defendant] had," defendant's brother had called him and requested that Williams speak with defendant's lawyer. Williams averred that he had spoken to defendant's lawyer "[a] few weeks" before trial. Williams appeared to testify at trial despite his concerns about having traffic warrants and needing to take time off from work. Williams denied that before trial he had notified the police about his knowledge of the charges against defendant. The trial court asked

[1] Although *Emery* and *Perkins* do not bind this Court because they were issued before November 1990, MCR 7.215(J), no binding precedent of this Court or the Michigan Supreme Court has overruled the nonalibi witness principles discussed in *Emery* and *Perkins*. In *People v Gray*, 466 Mich 44, 49; 642 NW2d 660 (2002), our Supreme Court held "that it is unnecessary for a prosecutor to establish any special foundation before cross-examining an alibi witness about the witness' failure to have come forward with information at an earlier time." In *Perkins*, *id*. at 195-196, quoting *People v Grisham*, 125 Mich App 280, 288; 335 NW2d 680 (1983), this Court reiterated the manners in which the knowledge possessed by nonalibi witnesses differs from that known by alibi witnesses:

> "On the other hand, a non-alibi witness, although possessed of potentially relevant and material information, is not necessarily aware that the information available to him or her will provide a defense to the charged offense or be relevant to the issues raised at trial. The information possessed by [the nonalibi witness] was not of such a nature that she would have had a 'natural tendency' to take it to the government prior to trial if it were true. The prosecutor should not have been permitted to insinuate her testimony was fabricated because she failed to do so."

No binding precedent has cast doubt on these distinctions.

Williams why he had not approached the prosecution before trial if he had information relevant to defendant's carjacking charge, and Williams answered,

> [I]t never came up to me like that. I don't do the court system, so I don't know to go down. I thought [the] only time I had something to say was in court. I didn't know I [could] actually go down and talk to somebody else besides the lawyer. Like I said, I talked to his lawyer.

Williams's testimony established that he and defendant had a close relationship and he possessed personal knowledge that no one had occupied the car when defendant drove it away. The nature of Williams's testimony also tended to prove defendant's innocence of the carjacking charge against him. MCL 750.529a. Under these circumstances, the prosecutor properly asked Williams whether he had contacted before trial either the police or the prosecutor to advise them that defendant had driven away an unoccupied car. *Emery*, 150 Mich App at 666-667; *Perkins*, 141 Mich App at 196-197. Williams also had the opportunity to explain why he had not informed law enforcement or the prosecutor about the information. We conclude that the prosecutor properly questioned defendant on cross-examination and did not commit misconduct. *Dobek*, 274 Mich App at 70. Even were we to assume impropriety in the prosecutor's cross-examination of Williams, the jury acquitted defendant of the carjacking charge. We thus detect no prejudice to defendant arising from the prosecutor's cross-examination of Williams.

In a related claim, defendant protests that his trial counsel rendered ineffective assistance in failing to object to the prosecutor's improper inquiry. But because the prosecutor properly cross-examined Williams, defense counsel need not have objected. *People v Thomas*, 260 Mich App 450, 457; 678 NW2d 631 (2004) (observing that "[c]ounsel is not ineffective for failing to make a futile objection"). Moreover, in light of the jury's acquittal of defendant on the carjacking charge, he cannot demonstrate any reasonable likelihood that the result of his trial would have differed had defense counsel objected. *People v Solmonson*, 261 Mich App 657, 663-664; 683 NW2d 761 (2004).

Defendant additionally requests a remand for resentencing on the basis that the trial court "failed to recognize and exercise legislatively authorized sentencing discretion" in crafting his sentence as a second habitual offender. The trial court sentenced defendant as a habitual offender pursuant to MCL 769.10, which provides that "the court . . . may place [defendant] on probation or sentence [him] to imprisonment for a maximum term . . . not more than 1-1/2 times the longest term prescribed for a first conviction of that offense." MCL 769.10(1)(a). "Contrary to defendant's assertion, there is no legal requirement that a trial court state on the record that it understands it has discretion and is utilizing that discretion." *People v Knapp*, 244 Mich App 361, 389; 624 NW2d 227 (2001). Instead, "absent clear evidence that the sentencing court incorrectly believed that it lacked discretion, the presumption that a trial court knows the law

must prevail." *Id*. Because the sentencing transcript contains no suggestion that the trial court mistakenly thought that it lacked discretion to sentence defendant, we reject his request for resentencing.

We affirm.

/s/ Pat M. Donofrio
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly